Rainbo Bread Company of Denver *and* Larry Paul Davis. Case 27-CA-8088

13 February 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 9 September 1983 Administrative Law Judge Richard D. Taplitz issued the attached decision. The General Counsel filed exceptions and a supporting brief. Respondent filed a brief in response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We agree with the judge's finding that the General Counsel has failed to show by a preponderance of the credible evidence that Respondent discharged employee Larry Davis and that the record supports instead the contention that Davis "walked away from the situation" and, in effect, quit prior to a meeting with Respondent scheduled to investigate the possibility of a discharge. We thus find it unnecessary to pass on the judge's alternative finding that, assuming a discharge, Davis' refusal to complete his driving assignment on 12 April 1982 was not protected activity within the meaning of Sec. 7 of the Act.

DECISION

STATEMENT OF THE CASE

RICHARD D. TAPLITZ, Administrative Law Judge: This case was heard in Denver, Colorado, on May 24, 1983. The complaint[1] dated March 21, 1983, was based on a charge filed on October 8, 1982, by Larry Paul Davis, an individual. The complaint alleges that Rainbo Bread Company of Denver (the Company) violated Section 8(a)(1) of the National Labor Relations Act, as amended.

Issues

The primary issues are:

1. Whether Davis was discharged or whether he quit.
2. If he were discharged, whether the discharge was motivated by Davis' protected activity in refusing to drive his truck under windy conditions which he considered dangerous.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel and the Company.

Upon the entire record of the case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE COMPANY

The Company, a Delaware corporation with its principal office and place of business at Commerce City, Colorado, is engaged at its plant in Commerce City, Colorado, in the manufacture and sale of bakery products. The Company annually sells and ships goods valued in excess of $50,000 directly to places outside of Colorado. The complaint alleges, the answer as amended admits, and I find that the Company is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 537 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Sequence of Events*

The Company and the Union are parties to a collective-bargaining agreement covering the Company's sales and transport employees, which is effective from August 2, 1981, through August 4, 1984. Larry Paul Davis (Davis), who is alleged to have been discharged in violation of the Act, was an employee covered by that contract. Article XIV of the contract provides: "The Employer shall not require an employee to operate any vehicle that is not safe or equipped with safety appliances prescribed by law." The contract also contains a detailed grievance and arbitration procedure which includes a provision for binding arbitration and an agreement that there will be no lockouts, strikes, or stoppages of work during the term of the contract.

Davis was employed by the Company for about 8 months, from August 1981 until April 12 or 14, 1982. The Company contends that he quit his employment on April 14, 1982, and the General Counsel contends that he was discharged on April 12. During his term of employment Davis drove a semitrailer delivering bakery products to different warehousing facilities for the Company. His immediate supervisor was Transport Supervisor George Wright, who in turn reported to General Sales Manager Charles Andres.[2]

[1] At the opening of the hearing the caption of the complaint was amended to show the correct name of Respondent.

[2] The complaint alleges, the answer admits, and I find that Wright and Andrews were supervisors within the meaning of Sec. 2(11) of the Act.

In the early morning of April 12, 1982, Davis was driving a truck with a 50-foot trailer between Ft. Collins, Colorado, and Laramie, Wyoming. He had stopped at Ft. Collins, Colorado, to unload some bakery products and racks. Davis testified that he was carrying a heavier load than on other nights, but the truck was less than a quarter full and he had a "light load."

About 1 a.m. on April 12 Davis was about 10 miles out of Ft. Collins driving on Route 287 toward Laramie, which was still about 39 miles away. He was driving at 30 to 35 miles an hour in a 40-mile-an-hour speed limit area when the wind caught his tractor-trailer and lifted it so that its left wheels were off the ground and he was put in the path of an oncoming truck. His truck then settled down and the other truck passed without incident. Davis spoke to the other truckdriver on a CB radio and the other driver told him that the winds were worse going further north toward Laramie. Davis turned his truck around and returned to the Ft. Collins' warehouse.

These findings are based on the testimony of Davis. Davis did not know the name of the other truckdriver and there were no witnesses who were in a position to contest or corroborate Davis' testimony in this regard. As indicated below I have serious reservations concerning Davis' credibility, but it is certain that something turned Davis around and even though it may have been exaggerated, his testimony concerning adverse wind conditions did appear plausible. The Company called several witnesses with regard to wind conditions that night. Austin Hamilton is a truckdriver for Continental Baking, a competitor of the Company. He testified that he was driving a truck similar to Davis' about the same location and time as Davis, that there were 30- to 40-mile-an-hour winds, that he did not have any problems, and that he made his delivery on schedule. He also averred that, when there are high winds, he simply slows down and proceeds at a reduced speed. Bob English was truckdriver for the Company for 15 years. He testified that he was driving similar equipment to Davis' about the same time and place on April 12, that the wind was blowing enough to cause him to slow down a little, but he made his deliveries close to schedule. Donald Flynn is transport and shipping superintendent for Wonder Bread, a competitor of the Company. He testified that part of his job was to monitor travel advisories and to make sure that roads were passable and trips could be made safely. He also testified that his trucks were similar to those of the Company; that his trucks operated on April 12 with no shutdowns; and that he called the Highway Patrol on the morning of April 12 and was told that there were high winds but that the roads were not shut down. He averred that he was not advised to pull his trucks off the road. Though the experiences of those witnesses were different from Davis' on the night of April 12, their testimony does not necessarily contradict that of Davis. A typical gust of wind could very well have caught Davis and not affected other trucks in the nearby area. However the testimony of the other witnesses makes it clear that the overall conditions in the area at the time in question were not in fact unsafe and that many trucks did follow Davis' route with no untoward incidents.

Davis arrived at the Ft. Collins warehouse between 1 and 1:30 a.m. From the warehouse he called the Highway Patrol dispatcher's office and spoke to a dispatcher named Jay.[3] The Highway Patrol dispatchers (referred to as dispatchers) are state employees who communicate messages and relay policy for the Colorado Highway Patrol. One of their functions is to give information about weather advisories to members of the public who call. The dispatchers are not sworn officers and cannot give orders to drivers.

Davis testified that he told dispatcher Jay that he was a driver for the Company, described his truck, and said that the wind was blowing pretty hard where he was. He testified that he asked Jay what the wind conditions were further north and that Jay answered by saying that the wind conditions were a lot worse, that the highway was shut down to light loads, mobile homes, and empties, and that Davis was to "shut it down" and call back in 2 hours. Jay did not testify. Lieutenant Phillip Tipton of the Colorado State Patrol did testify. He averred that under a travel advisory the State Patrol can restrict certain traffic and can enforce that restriction by giving citations or requiring a vehicle to park. He also averred that a dispatcher is not a sworn officer and has no authority to give orders. Tipton wrote a letter to Davis dated April 23, 1982, which stated:

> On April 12, 1982, there was a travel advisory on Colo. 287 due to high winds. This advisory applied to semi's, campers, towed vehicles, and house trailers. When there is an advisory discouraging travel, we expect compliance.
>
> According to our records, you called and were told by our dispatcher not to move your truck until the winds subsided. We appreciate your cooperation in complying with the travel advisory.

I have reservations concerning the accuracy of Davis' testimony. It is unlikely that the dispatchers, whose duty was simply to pass on information, would have made an evaluation of whether a 50-foot trailer with a partial load of produce and racks constituted a light load or not. Despite these reservations, on the basis of Tipton's letter, I credit Davis' testimony that he was told by the dispatcher to "shut it down."

About 2 a.m. that day Davis called his supervisor, George Wright, at Wright's home. Davis said that there were high wind conditions, that the dispatcher had said to shut the truck down, and that he was shutting down at Ft. Collins. Wright told him to sit tight at Ft. Collins until he got back to him.

Immediately after speaking to Davis, Wright made three telephone calls. He called the Laramie port of entry, the Ft. Collins port of entry, and the Colorado Department of Highways in Ft. Collins. On each call he asked about road conditions and he was told that there were high winds. None of the state officials indicated that there were any road closures. The Laramie port of

[3] Davis did not know Jay's last name.

entry told him that the wind was blowing but traffic, including high profile trucks, was still going through.

About 3 a.m. Wright called Davis. Wright said that he had verified the road conditions, that Route 287 as well as I-25 was open, and that Davis was to choose one of the routes and continue on his run. Davis said that he would see what he could do about it. At that point Wright had the impression that Davis would continue the run.[4]

Davis stayed at Ft. Collins and about 4 a.m. once again called dispatcher Jay. Jay told Davis that the winds were not dying down and if anything were getting worse, and that he should keep right where he was. Davis asked about conditions on Route I-25 and Jay said that the wind restrictions were there as well and that Davis should stay where he was and call back about sunup. Davis stayed at Ft. Collins and he did not call Wright about that conversation with Jay.

Shortly before 6 a.m. that day the Company's general sales manager, Charles Andrews, was informed by supervisors in Laramie, Wyoming, that Davis' truck was still in Ft. Collins and that it had been there for some time. Andrews called the port of entry in Ft. Collins and was informed that there were wind restrictions but traffic had been moving all night on both Route 287 and I-25 to Cheyenne. He then called the port of entry in Cheyenne and was told that traffic had been moving all night on I-80 between Cheyenne and Laramie, and that the only restriction the highway department had placed was on traffic involving trailer homes. Andrews also called the port of entry in Laramie, Wyoming, to determine the status of Highway 287 from Laramie to Ft. Collins and was told that traffic had been moving in a normal manner to Route 287 all night. At that point Andrews called Davis at Ft. Collins to see whether Davis was going to proceed with the run. Andrews told Davis what he heard from the ports of entry. Davis said that as long as the winds were blowing, he was not going to continue on his scheduled run. Davis then said that he had two previous employee conferences involving accidents, that he was not going to jeopardize his job by driving, and that if Andrews gave him a guarantee that he would not lose his job if the truck blew over, he would go ahead and drive. Davis began to use foul language directed at Andrews and Andrews hung up the phone.[5]

After speaking to Davis, Andrews called Wright. He told Wright that he had spoken with Davis, that Davis was not going to continue the run; and that Wright should take another employee, Jess Larkin, to Ft. Collins, and have Larkin complete the trip. He also told Wright to bring Davis back with him.

After speaking to Andrews, Wright called Ft. Collins and spoke to Davis. Wright told Davis to get the truck on the road on either route that Davis thought safest but to get it rolling. Davis said that he would not move the truck because of the high winds. Wright repeated to Davis the information he had received from the state authorities. Davis asked what would happen to him if he did not drive and Wright said there would be disciplinary action taken and possible termination. Wright then told Davis that Wright would pick up a relief driver and meet Davis in Ft. Collins. Davis agreed to that. These findings are based on the testimony of Wright. Davis testified that he had two conversations at or about 6 a.m. with Wright rather than the one conversation testified by Wright. I credit Wright. Davis testified that in the first conversation he called Wright and Wright said that Andrews was threatening to fire Davis. Davis testified that after talking to Andrews, he again called Wright and said that he had decided to go ahead with the run. Davis averred that Wright told him they already had a driver there to replace him and that he was fired. Davis also averred that he asked Wright if Wright was going to bring him back to Denver; that Wright told him it would not look right if he brought him back, and that Davis should find his own way. Wright specifically denied telling Davis that Davis was fired and specifically denied telling Davis that Davis could not ride back with him. Wright averred that he told Davis that he would bring a relief driver to relieve him and that they would talk about it when they got back to Denver. I credit Wright's version of the conversation and I do not credit Davis.[6]

About the time of his conversations with Andrews and Wright, Davis once again called the dispatcher's office. This time he talked to a dispatcher named Elsie Schnor. The dispatcher said the travel advisories were still in effect and that if he did drive it was at his own risk. Davis asked whether that meant he should shut down and the dispatcher told him not to move the truck.

When Wright arrived with the replacement at Ft. Collins, Davis was no longer there. He had hitchhiked back to Denver.

Shortly after his 6 a.m. call to Davis, Andrews called the Union. He spoke to Paul Rummage, who was secretary-treasurer and business agent of the Union.[7] He ex-

[4] These findings are based on the testimony of Wright. Davis, in his testimony, did not refer to this conversation. Wright's testimony was internally consistent and his demeanor on the stand was such as to instill confidence in his veracity. As indicated by the discussion of Davis' subsequent conduct with regard to his remarks to Andrews, his failure to attend meetings with company officials, and his antagonism to his own union representatives, which matters are set forth below, it appears that Davis was an emotional man whose passions were capable of overruling his judgment and clouding his perceptions. Where his testimony conflicts with that of Wright, I credit Wright.

[5] These findings are based on the testimony of Andrews as well as some admissions by Davis. Davis testified that Andrews told him to make the run; he told Andrews that he would go when it was safe; Andrews told him to take I-25; he told Andrews that there were wind restrictions there as well and that the highway patrol had told him to shut down; Andrews said that he did not "give a damn" what the highway patrol said and that he should go or else; he said that he would not go unless Andrews guaranteed him that he would not lose his job if the truck blew over; Andrews told him that he better not wreck the truck; and he said he would not go until the highway patrol said it was safe. As indicated above, I have serious doubts with regard to Davis' credibility based both on his demeanor and the substance of his testimony. I have no reason to doubt Andrews. Where their testimony conflicts, I credit Andrews.

[6] As is set forth below, later that morning Andrews called the Union to arrange a meeting with company representatives, union representatives, and Davis. It appears that Andrews was contemplating disciplinary action of some kind against Davis. If Davis had already been fired as he claimed, it is unlikely that the Company would have been the one to arrange the meeting. It is also noted, as is set forth more fully below, that later that morning when Davis spoke to his union business agent he told the business agent that Wright had told him he probably would be terminated if he did not move the truck. He did not tell the business agent that he had been fired.

[7] Rummage died sometime prior to the hearing.

plained the situation concerning Davis to Rummage and scheduled a meeting for that morning, which the Union and Davis were to attend.

After talking to Rummage, Andrews filled out part of a "Conference With Employee Record" form and signed it. The initial section of that form sets forth the details of Davis' refusal to make the delivery. The next section, which was entitled "Employee's Viewpoint or Side of the Problem Expressed During the Conference," was left blank. The final section, which was entitled "Basis On Which the Employee Conference Was Finalized," stated:

> Since the State Patrol has not closed the Highways and had only issued high wind warnings and advised caution it is Rainbo Bread Co. decision that Larry should have continued his scheduled delivery, due to his refusal—termination of employment will be effective 4/12/82.

Andrews testified that that form was typed up in anticipation of the meeting that was scheduled between the Company, the Union, and Davis for that morning and that it was to be used only in the event that the decision after the interview was to terminate. As indicated below the meeting was never held. Andrews averred that the form was not used and that Davis was not terminated on April 12. The Company's employment records show that Davis' last day worked was April 11, 1982, and also show his termination as of that day. In one employee record the reason given for termination is "terminated." On another record the reason for separation is given as "terminated." Andrews testified that in all company forms the word "termination" is used whether an employee quit or was discharged. There was no evidence to refute that contention and I believe that Andrews was a credible witness. I credit both his assertion that the "Conference With Employee Record" was prepared as a draft to be used in case a final decision was made to discharge Davis after the interview with Davis and his union representative. I also credit Andrews' assertion that the word "termination" on the employee records was neutral and did not indicate either discharge or quit.

About 8 a.m. on April 12, Davis called the Union and spoke to Business Agent Edward Modecker. He told Modecker of the problem he had with high winds. Modecker then called Andrews and learned that a meeting had been scheduled to take place whenever Davis came back from his route. About 9:30 a.m., Davis appeared at the union office and told Modecker that he did not want to meet with the Company that morning because he was too nervous and upset. Modecker then called Andrews and canceled the meeting. Davis told Modecker that he almost had an accident; that he went back to Ft. Collins; that he called the dispatcher, Jay Lawrence, who told him to shut down his vehicle due to wind restrictions; that later he spoke to another day dispatcher named Elsie; and that he had called Wright and said that he would not move his vehicle because of what the Highway Patrol had said. Modecker credibly testified that Davis told him that he had been informed by Wright that if he did not move the vehicle, he would probably be terminated. Modecker also credibly testified that Davis did not tell him that he had already been fired.

Because Davis did not want to meet with the Company on April 12, Modecker rescheduled the meeting with the Company for April 14, 1982.

Sometime between his April 12 conversation with Davis and the meeting that had been scheduled for April 14, Modecker undertook an investigation of the situation. He called dispatcher Elsie on the telephone and asked her what she had told David. Elsie replied that she had told Davis that there were wind restrictions on the road. He asked her if she told Davis to shut down a vehicle and that she had just told Davis that there were wind restrictions on the road. Modecker then called dispatcher Jay Johnson and asked him the same thing. Johnson said that he had told Davis that if possible Davis should wait for daylight to move the vehicle and that it would be safer if he could wait until morning. Johnson said that he did not have authority to tell Davis to shut down.

The meeting between Davis, the Union, and the Company had been scheduled for 9 a.m. on April 14. Shortly before 9 a.m. that day Davis met with Modecker and Union Secretary-Treasurer Rummage in the company parking lot. Rummage told Davis that they had checked with the dispatchers and had talked to drivers from Continental Baking who had made the run and there could be a problem. Davis replied that that was what he thought they were going to say; that he had been driving for 18 years; that he could find a job any place he wanted to; and that he did not want to meet with Andrews.[8]

Davis got into his car and drove off. Modecker and Rummage then went into the company facility and met with Andrews and Wright. Rummage told Andrews and Wright that Davis said that he was not going to attend the meeting and was going to quit.[9]

Davis filed a grievance dated April 16, 1982, in which he complained that he was unjustly terminated for failing to run when he had been told by the highway patrol not to move his truck. About a month later Andrews met with Davis and Modecker to discuss the grievance. Andrews took the position that Davis had voluntarily quit and that the Company was under no obligation to reinstate him.[10]

On October 8, 1982, Davis filed the charge in the instant case. He also filed a charge against the Union claiming that the Union had unlawfully failed to fairly

[8] These findings are based on the testimony of Modecker. Davis testified that Rummage told him that he was going to the meeting and arrange to have it called a voluntary quit instead of a firing and that he (Davis) became angry and said "I don't need this job, forget it." I credit Modecker and I do not credit Davis.

[9] This finding is based on testimony of Andrews and Wright. Modecker testified that he did not recall saying that Davis told him that he was going to quit. He averred that Andrews said that as far as he was concerned, Davis had quit because he had not attended the meeting. Although I believe all three witnesses were honestly trying to recall the event, Wright's corroboration of Andrews persuades me that Andrews' recollection of the incident was more accurate than Modecker's.

[10] This finding is based on the testimony of Andrews. Davis testified that Andrews said that he (Davis) had not attended the first meeting and the firing stood. I credit Andrews and not Davis.

represent him. That charge was dismissed by the General Counsel and is not an issue in this case.

About a week or two prior to the April 12 incident Davis told another company truckdriver, Bob English, that he (Davis) was not happy with his job and that he would like to leave.

B. *Analysis and Conclusions*

The complaint alleges that Davis was discharged in violation of the Act. The threshold question is whether Davis was in fact discharged. If he were not, then the complaint must fail.

The issue turns on credibility. Davis testified that Wright told him that he was fired. Wright, in his testimony, denied that he either fired Davis or told Davis that he was fired. Davis' testimony is buttressed by the language of the Company's "Conference With Employee Record" which states as the "basis on which the employee conference was finalized" that due to Davis' refusal to drive, his termination would be effective on April 12, 1982. In addition the use of the term "terminated" on other company records tends to support Davis' contention. However, the "conference" on which the "Conference With Employee Record" was to be based never took place and Andrews' testimony that that document was simply an unused draft that was made up in anticipation of the conference was credible. Andrews' testimony was also credible concerning the company policy of uniformly using the word "termination" on company records to indicate both "quit" and "discharge." As indicated in more detail in the discussion above, there were a number of other reasons to credit Andrews and Wright over Davis, not the least of which was their testimonial demeanor. The Company and the Union maintained and enforced a collective-bargaining agreement covering employees in Davis' classification. That contract contained a detailed grievance procedure. The Company took the position, in effect, that before it was going to take a final personnel action regarding Davis, company officials were going to meet with the Union and Davis. That position is not inherently unbelievable. It is clear from the "Conference With Employee Record" as well as Wright's and Andrews' remarks to Davis that they were seriously considering taking action against Davis. Davis quite correctly perceived that his job was in jeopardy. However, it was the Company and not the Union who set up the meeting with Davis and the Union for April 12, 1982. It is likely it would have been the other way around if Davis had been discharged. Modecker credibly testified that Davis informed him that Wright had said that Davis would probably be fired. That language would not have been used if Davis had already been notified of a discharge. On April 14 Davis was apparently upset with his own representatives because they had investigated the situation and found facts that were not very favorable to him. He showed his pique at both the Company and the Union by telling his representatives that he did not need the job and by failing to attend the scheduled meeting, as he had failed to attend the meeting on April 12. His actions and statements as a whole were more indicative of his belief that he was likely to be fired than that he had already been fired. A few weeks before, he had told an employee that he was unhappy with working for the Company. When the August 12 incident happened he simply walked away from the situation. The company officials may have been very pleased by Davis' action because it relieved them of the necessity to make a decision whether to effectuate his discharge. However, that did not constitute a discharge. In sum, I find that the General Counsel has not established by a preponderance of the credible evidence that the Company discharged Davis and therefore, the allegation that Davis was discharged in violation of the Act must be dismissed.

Moreover, even if the General Counsel had established that the Company discharged Davis, under the particular facts of this case, I do not believe that the discharge would have been in violation of the Act.

Section 7 of the Act protects employees in their right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." There has been extensive litigation and many conflicting Board and court decisions relating to the question of when an action by an individual can be constructed as protected concerted activity. For the purposes of this case there are two primary lines of approach. The first relates to situations where there is no attempt to enforce a collective-bargaining agreement but the individual action is keyed to the common concern of employees. This area of the law is rapidly evolving and is far from clear. See Administrative Law Judge William J. Pannier III's discussion of this issue, *Enterprise Products*, 264 NLRB 946, 948 (1982), also see the analysis entitled "Rejection of Doctrine of Constructive Concerted Activity," 112 LRRM Analysis 45, March 21, 1983. However, in situations similar to the instant case, where fellow employees do not share the concern of an individual who complains about the safety of a truck, where the condition of the truck is of moment to the individual alone and there is no evidence on which an inference can be made that other employees made common cause with the individual, then the individual's activity would not be considered protected activity. *Comet Fast Freight*, 262 NLRB 430 (1982). The second situation arises where the individual's activity relates to an attempt to enforce a contract provision regarding employee rights not to be compelled to operate unsafe equipment. The Board has held that in such circumstances an employee's refusal to operate the equipment, where that refusal is based on the employee's reasonably held good-faith belief that the equipment is unsafe, is an activity protected by the Act. *American Freight System*, 264 NLRB 126 (1982). See also *Interboro Contractors*, 157 NLRB 1295 (1966), enfd. 388 F.2d 495 (2d Cir. 1967). That conclusion is based on the premise that the employee is acting not only in his own interest but is attempting to enforce the contract provision in the interest of all the employees covered by the contract. Some court of appeals have agreed with the Board and others have not. The issue is now before the United States Supreme Court in *NLRB v. City Disposal Systems*, No. 82-960, cert. granted March 28, 1983 (appeal from 683 F.2d 1005 (6th Cir. 1982)), denying enforcement to 256 NLRB 451 (1981). As the Supreme Court has not yet ruled, I am bound by Board precedent.

However, that precedent indicates that the individual's action in attempting to enforce the contract claim is only protected where it is based on the employee's reasonably held good-faith belief that the driving would be unsafe. I do not believe that the evidence supports the contention that Davis' actions were based on such a good-faith belief.

Davis was driving at 30 to 35 miles an hour when the side of his truck was lifted by the wind. He was told by another truckdriver that the wind was stronger down the road. He turned his truck around and went back to Ft. Collins. Upon calling the state highway dispatcher, he learned that there was a wind advisory and that the road was shut down to light loads. He was advised to shut it down and call back later. Up to that point there is no questioning concerning Davis' good faith. When he called, Supervisor Wright then checked the situation with three different state authorities that had knowledge of the road conditions. The information he received indicated that there was nothing to prevent Davis from carrying out his assignment. Wright relayed that information to Davis, but Davis still did not continue the trip. Davis made other calls to the highway dispatcher and received advice similar to that he obtained from the first dispatcher. In the meantime, Andrews made a number of calls to state officials and found that there was no problem with Davis continuing the run. Andrews reported those conversations to Davis, but Davis still refused to make the delivery. At that point there is still a serious argument that Davis was acting in good faith. There were conflicting reports with regard to matters that could affect his safety and the sincerity of his belief rather than the fact of danger was controlling.[11] Many other drivers made the run without difficulty, but that in itself did not affect the question of Davis' good faith. However, as Davis was a driver with 18 years' experience, there is some question whether Davis' evaluation of the situation was really different from that of the other experienced drivers who did successfully make the trip. There is even some question whether he really believed he had a "light load" that was subject to the wind advisory. Other drivers indicated when they ran into difficulty with wind conditions they merely slowed down and avoided any problem.[12] Davis made no effort to continue his run at a lower rate of speed. He told Andrews that he had had two previous employee conferences involving accidents and he demanded a guarantee that he would not lose his job if the truck blew over. That statement indicated that Davis' real concern was his dissatisfaction with the Company's actions regarding his previous accidents and not with his personal safety. If Davis really thought that he would put himself in danger of injury by driving the truck, it is not likely he would have said he would continue to drive with that type of guarantee. Many of Davis' subsequent actions indicated that he was not really interested in the safety question or even in his job, but that he was merely expressing his personal animosity toward his employer. Instead of waiting to be picked up by Wright and returning for a conference with Andrews, he left the truck and hitchhiked to Denver. He told his union representative he did not want to meet with Andrews that morning. On April 14, before the next scheduled meeting, he expressed his resentment against his own Union when union officials told him the results of their investigation of the incident. He also expressed a lack of interest in his job and refused to attend the scheduled meeting with the company officials.

Article XIV of the collective-bargaining agreement states that the employer shall not require an employee to operate any vehicle that is not safe. There is no evidence that the vehicle in question here was in itself usafe. I believe the contract clause broad enough to cover situations where the driving of the equipment is unsafe because of external conditions such as high winds. However, viewing all the circumstances and Davis' actions as a whole, I do not believe that it can be fairly said that his continued refusal to drive the truck was based on his reasonably held good-faith belief that the driving would be unsafe and that he was simply attempting to enforce a contract provision. I therefore find that his refusal to drive the truck was not a protected activity.

CONCLUSIONS OF LAW

1. The company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The General Counsel has not established by a preponderance of the credible evidence that the Company violated the Act as alleged in the complaint.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended

ORDER[13]

The complaint is dismissed in its entirety.

[11] *American Freight Systems*, 264 NLRB 126 (1982).

[12] State Patrol Lt. Tipton testified that in his experience the speed of a truck could be irrelevant with regard to wind problems and that a parked truck could be blown over. However, the speed of a truck does cause one of the vector forces acting on the stability of the truck and the strength of that force does depend on the speed of the truck.

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.